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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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RICARDO JOSE LOPEZ,	Case No. 3:11-cv-00635-MMD-VPC
Petitioner,	ORDER
v.	
TIMOTHY FILSON, <i>et al.</i> ,	
Respondents.	

This habeas matter under 28 U.S.C. § 2254 comes before the Court on respondents' motion to dismiss. (See ECF No. 83, *corrected by* ECF No. 84.) Respondents seek the dismissal of certain claims following a stay to exhaust state judicial remedies.

**I. BACKGROUND**

Petitioner Ricardo Lopez challenges his Nevada state conviction, pursuant to a jury verdict, of murder with the use of a deadly weapon and attempted murder with the use of a deadly weapon. In a February 20, 2013, order, this Court, *inter alia*, (a) held that paragraphs 2, 3, 5, 6 and 7 of Ground 4(A) were unexhausted; and (b) dismissed Ground 5 as noncognizable. (ECF No. 30 at 8.) On July 17, 2013, the Court granted petitioner's motion for a stay to return to the state courts to exhaust the unexhausted claims. (ECF No. 36.) On January 14, 2015, the Court granted petitioner's motion to reopen the matter. (ECF No. 43.) Petitioner thereafter filed a second amended petition (ECF No. 67), and respondents have filed the present motion to dismiss.

1     **II.     DISCUSSION**

2             **A.     Alleged Failure to Comply with the Stay Order**

3             Respondents contend that the second amended petition should be dismissed  
4 because petitioner allegedly failed to comply with the provisions of the stay order.

5             The July 17, 2013, order provided in pertinent part:

6                     IT IS FURTHER ORDERED that the grant of a stay is conditioned  
7 upon petitioner filing a state post-conviction petition or other appropriate  
8 proceeding in state court within forty-five (45) days from the entry of this  
9 order and returning to federal court with a motion to reopen and an  
amended petition incorporating the dismissed grounds for relief within forty-  
five (45) days of issuance of the remittitur by the Supreme Court of Nevada  
at the conclusion of the state court proceedings.

10                    IT IS FURTHER ORDERED that this action shall be subject to  
11 dismissal upon a motion by respondents if petitioner does not comply with  
12 the time limits in this order, or if he otherwise fails to proceed with diligence  
during the stay imposed pursuant to this order.

13             (ECF No. 36 at 3.)

14             Petitioner already had a proper person state post-conviction petition pending in the  
15 state district court at the time of the July 17, 2013, order. (See ECF No. 39-1; Exhibit 131.)  
16 He filed a motion to reopen in this Court on December 22, 2014, which was within forty-  
17 five (45) days of the November 13, 2014, issuance of the remittitur at the conclusion of  
18 the state court proceedings. (See ECF No. 39-23; Exhibit 153.)

19             Respondents maintain that the Court should dismiss the second amended petition  
20 because petitioner filed an identical second petition in the state court on November 14,  
21 2013, that allegedly complicated and delayed the state proceedings. The two petitions  
22 were addressed in a single, consolidated appeal, in state proceedings spanning only  
23 sixteen months. (See ECF No. 39-22; Exhibit 152.) Respondents contend that the prior  
24 stay order “was expressly conditioned on [petitioner] filing an ‘appropriate’ proceeding in  
25 state court.” (ECF No. 84 at 4.) Respondents urge that petitioner’s filing of two successive  
26 post-conviction petitions violated the Court’s order because they were not “appropriate  
27 proceedings.” (*Id.*)

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1           The Court is not persuaded. Respondents misread the provision in question. The  
2 provision did not condition the stay upon whether or not the manner in which petitioner  
3 prosecuted the state proceedings was in one sense or another “appropriate.” Rather, the  
4 provision conditioned the stay upon petitioner timely “filing a state post-conviction petition  
5 or other appropriate proceeding.” (ECF No. 36 at 3.) That language allowed the petitioner  
6 flexibility in the *type* of proceeding or proceedings that he filed in the state court, *i.e.*,  
7 allowing petitioner to file a state post-conviction petition and/or some other appropriate  
8 type of proceeding if necessary to exhaust the claims. Petitioner complied with the order  
9 by having filed a state post-conviction petition — a type of filing expressly contemplated  
10 by the order — prior to the applicable time period. The particular provision in question  
11 otherwise is not directed to the manner in which a petitioner — particularly a then *pro se*  
12 petitioner — pursued relief in the state courts after timely filing an appropriate type of  
13 proceeding during the stay.

14           Petitioner maintains that he mistakenly signed and sent the second petition to the  
15 state district court after prior federal habeas counsel (who was not representing petitioner  
16 in the state proceedings) sent him the second petition. (See ECF No. 86-1.) The record  
17 does not reflect egregious behavior intentionally delaying the state court proceedings,  
18 and noncapital petitioners typically have no incentive to seek to do so. *Cf. Lawrence v.*  
19 *Florida*, 549 U.S. 327, 344 & n. 9 (2007) (Ginsburg, J., dissenting) (“Most prisoners want  
20 to be released from custody as soon as possible, not to prolong their incarceration. They  
21 are therefore interested in the expeditious resolution of their claims. . . . Though capital  
22 petitioners may be aided by delay, they are a small minority of all petitioners.”); *Valdovinos*  
23 *v. McGrath*, 598 F.3d 568, 574 (9th Cir. 2010), *vacated for reconsideration on other*  
24 *grounds*, 562 U.S. 1196 (2011) (petitioner “had not engaged in dilatory tactics and he had  
25 no motivation for delay, as he is not a capital defendant”). The Court leaves for another  
26 day the action that might be warranted upon a record instead reflecting either egregious  
27 intentionally dilatory behavior or an absence of diligence over an extended period of time

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1 during a stay. *Cf. Rhines v. Weber*, 544 U.S. 269, 278 (2005) (absence of intentionally  
2 dilatory behavior a factor in initial grant of the stay).

3 The motion therefore will be denied to the extent that it seeks dismissal on this  
4 basis.

5 **B. Procedural Default of Ground 4(A)**

6 Respondents seek the dismissal of Ground 4(A)<sup>1</sup> as procedurally defaulted  
7 following upon the state court holding that petitioner's state petition pursued during the  
8 stay was untimely and successive.

9 At the outset, the procedural default defense is applicable only to paragraphs 2, 3,  
10 5, 6 and 7 of Ground 4(A). The Court held prior to the stay that paragraphs 1 and 4 of  
11 Ground 4(A) were exhausted. The state supreme court held in its order affirming the  
12 denial of post-conviction relief during the stay that petitioner had failed to demonstrate  
13 good cause and prejudice as a basis for again presenting claims that previously had been  
14 decided on the merits. (ECF No. 39-22 at 3-4.)<sup>2</sup> If a claim previously has been fairly  
15 presented to the state courts, a state court decision declining to again consider the claim  
16 on the merits does not lead to a procedural default of the claim. *Cf. Cone v. Bell*, 556 U.S.  
17 449, 466-67 (2009) (a state court refusal to readjudicate a claim addressed previously on  
18 the merits does not give rise to a procedural default but instead is indicative that the claim  
19 is ripe for federal adjudication).

20 With regard to the previously-unexhausted claims of ineffective assistance of trial  
21 counsel, petitioner maintains that he can establish cause and prejudice overcoming the  
22 procedural default of the claims based upon alleged inadequate assistance of initial state  
23 post-conviction counsel in failing to raise the claims, relying upon *Martinez v. Ryan*, 566

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24 <sup>1</sup>The second amended petition (ECF No. 67) carries forward the subdivisions of  
25 the substantially identical prior Ground 4 from the first amended petition (ECF No. 8), but  
26 the pleading does not identify the subdivisions by letter as in the first amended petition.  
27 Like respondents, the Court will continue to refer to the first two subdivisions of the claim  
28 by the letter used in the first amended petition, for ease of reference and continuity in  
relation to prior rulings herein.

<sup>2</sup>All citations to pages in exhibits are to the page number in the header generated  
by CM/ECF, not to any internal page numbering in the original document.

1 U.S. 1 (2012). A petitioner seeking to overcome a procedural default under *Martinez* must  
2 demonstrate that: (1) the claim of ineffective assistance of trial counsel is substantial, *i.e.*,  
3 that the claim has some merit; and (2) post-conviction counsel was ineffective under the  
4 standards in *Strickland v. Washington*, 466 U.S. 668 (1984), in failing to raise the claim.  
5 *See, e.g., Runnigeagle v. Ryan*, 825 F.3d 970, 982 (9<sup>th</sup> Cir. 2016).<sup>3</sup>

6 Following review of the allegations of Ground 4(A) and the related allegations in  
7 Ground 5 (discussed *infra*), the Court defers a resolution of the cause-and-prejudice  
8 analysis under *Martinez* until after the filing of an answer and reply contingently  
9 addressing Ground 4(A) also on the merits, so that the Court may have the benefit in its  
10 analysis of a full factual and legal presentation as to all relevant claims.

### 11 **C. Noncognizability of Ground 5**

12 Ground 5 alleges that petitioner was denied effective assistance of post-conviction  
13 counsel in violation of the Sixth and Fourteenth Amendments. Notwithstanding the Court's  
14 dismissal of Ground 5 in the first amended petition, petitioner reasserted an updated  
15 version of the claim, *inter alia*, citing to *Martinez*.

16 The Court cited to *Martinez* in the prior order of dismissal. (See ECF No. 30 at 6-  
17 7.) Nothing in *Martinez* leads to a conclusion that Ground 5 presents an independently  
18 cognizable claim for relief in a federal habeas proceeding. As discussed in *Martinez*, 28  
19 U.S.C. § 2254(i) expressly provides that ineffective assistance of post-conviction counsel  
20 shall not provide a ground for relief in a § 2254 habeas proceeding. *See* 566 U.S. at 17.

21 Ground 5 therefore again will be dismissed.<sup>4</sup>

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22 <sup>3</sup>There is no issue as to whether the remaining requirements for application of the  
23 rule in *Martinez* are satisfied. The earlier state post-conviction proceeding where the  
24 allegations in paragraphs 2, 3, 5 and 7 were not raised in the first instance in the state  
25 district court was the initial collateral review proceeding. And Nevada procedural law in  
effect required petitioner to assert claims of ineffective assistance of trial counsel in that  
proceeding as opposed to on direct appeal. *See generally Runnigeagle*, 825 F.3d at  
978-82 (discussing remaining requirements).

26 <sup>4</sup>The prior order also held that the claim was unexhausted, and petitioner did not  
27 exhaust Ground 5 during the stay. The claim in all events is subject to dismissal under 28  
28 U.S.C. § 2254(b)(2) because it is clear that the claim fails to present even a colorable  
claim for federal habeas relief as a standalone claim. *See Cassett v. Stewart*, 406 F.3d  
614, 623-24 (9<sup>th</sup> Cir. 2005) (standard for dismissal under § 2254(b)(2)).

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